

STATE OF MICHIGAN
COURT OF APPEALS

THOMAS J. BESHKE,

Plaintiff-Appellee,

v

TEK SALES & MARKETING, INC.,

Defendant-Appellant.

UNPUBLISHED

March 8, 2007

No. 271282

Oakland Circuit Court

LC No. 05-068815-CK

Before: Hoekstra, P.J., and Markey and Wilder, JJ.

PER CURIAM.

Defendant appeals as of right from the circuit court's order granting judgment for plaintiff on cross motions for summary disposition. We reverse and remand. This appeal is being decided without oral argument in accordance with MCR 7.214(E).

On April 1, 2000, the parties entered into an agreement under which plaintiff would be paid \$175,000 per year in exchange for plaintiff's services as a sales representative for defendant. The agreement stated that plaintiff would service Uni-Bond Extrusions, a customer plaintiff brought under defendant's umbrella. This agreement included no integration clause. Although the agreement did not so state, apparently the parties operated with the understanding that defendant's obligation to pay plaintiff as provided was contingent upon Uni-Bond's paying a continuing stream of commissions to defendant.

In time, plaintiff developed health problems that hampered his ability to attend to his sales obligations. In response, on September 4, 2002, the parties executed a separation agreement, which expressly supplanted the earlier contract, and provided that defendant would pay plaintiff \$7,000 a month from October 1, 2002, through October 2005. This agreement likewise included no integration clause. Defendant paid accordingly through August 2004, then stopped after Uni-Bond, facing financial difficulties, delayed, then stopped paying defendant.

Plaintiff brought suit, seeking enforcement of the parties' separation agreement according to its plain terms. Defendant defended by asserting the parties' understanding that its obligation to pay its salesperson was contingent upon receiving commissions from that salesperson's customer, and thus that Uni-Bond's failure to pay relieved defendant of having to pay plaintiff in turn. Defendant insisted that it should be allowed to bring evidence to show that the agreement, despite appearances, was not a complete expression of the parties' intentions. The trial court

held that the separation agreement was complete on its face and enforceable without recourse to extrinsic evidence.

We review a trial court's decision on a motion for summary disposition de novo as a question of law. *Ardt v Titan Ins Co*, 233 Mich App 685, 688; 593 NW2d 215 (1999).

In general, "Where a contract is clear and unambiguous, parol evidence cannot be admitted to vary it." *In re Skotzke Estate*, 216 Mich App 247, 251; 548 NW2d 695 (1996). However, a prerequisite to the application of this rule is that "there must be a finding that the parties intended the written instrument to be a complete expression of their agreement as to the matters covered." *NAG Enterprises v All State*, 407 Mich 407, 410; 285 NW2d 770 (1979). To that end, "Extrinsic evidence of prior or contemporaneous agreements or negotiations is admissible as it bears on this threshold question of whether the written instrument is such an 'integrated' agreement." *Id.* The question, then, is whether defendant offered evidence to show that the parties intended to supplement their written agreement with unwritten understandings.

Defendant points to the affidavit of its president, asserting that, according to the parties' initial agreement, plaintiff's salary "was contingent upon (1) representations made by [plaintiff] regarding Uni-Bond's future and past commission stream; and (2) Uni-Bond continuing to pay TEK commissions in full," adding that, because sales representatives are compensated on a commissions basis, if the principal (client) does not pay commissions when they are due and owing, then sales representatives and salesmen are not paid," this being "industry custom and practice" (bold typeface omitted). The affidavit further acknowledged that the parties' separation agreement does not speak to any such contingency, but asserted that the provision for plaintiff's salary under that contract was nonetheless "contingent upon TEK being paid by Uni-Bond," this having been "discussed and agreed to by [the parties] in meetings with [plaintiff]." The affidavit reiterated that, "as an experienced sales representative like [plaintiff] would know, if the principal (client) does not pay commissions when they are due and owing, then sales representatives and salesmen are not paid," according to "industry custom and practice (bold typeface omitted).

Defendant thus offered evidence to show that the parties were operating in part on the basis of an unwritten understanding reflecting industry custom. Because extrinsic evidence is admissible in connection with the question whether the written agreement is an integrated one, *NAG Enterprises, supra*, the trial court erred in this case by refusing to consider that evidence in pure deference to the four corners of the separation agreement.

Reversed and remanded. We do not retain jurisdiction.

/s/ Joel P. Hoekstra

/s/ Jane E. Markey

/s/ Kurtis T. Wilder